IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

Nos. 75-1475, 75-1478

UNITED STATES STEEL CORPORATION,
Petitioner,

—v.—

JOHN S. FORD, *et al.*

UNITED STEELWORKERS OF AMERICA AFL-CIO-CIC, and its LOCAL UNIONS 1013, 1131, 1489, 1700, 1733, 2122, 2210, 2405, 2421, 2927, 3662 and 4203,
Petitioners,

—v.—

JOHN S. FORD, *et al.*

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION TO CERTIORARI

JACK GREENBERG
JAMES M. NABRIT, III
ERIC SCHNAPPER
BARRY L. GOLDSTEIN
STANLEY ENGELSTEIN
10 Columbus Circle
New York, New York 10019

OSCAR ADAMS
JAMES K. BAKER
U. W. CLEMON
Suite 1600, The 2121 Building
2121 Eighth Avenue North
Birmingham, Alabama 35203

Attorneys for John S. Ford, et al.

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Statement

The district court had found that the defendants Steelworkers and United States Steel Corporation, petitioners here, had engaged in patterns and practices of racial discrimination in employment which required injunctive relief designed to remedy the effects of that discrimination with respect to the seniority and transfer system, training and apprenticeship programs, and selection for plant

protection, clerical and supervisory jobs. (Pet.A18-A41[1]) Neither the Steelworkers nor U.S. Steel challenged the district court's findings of widespread racial discrimination. (See Pet.A77) Rather the Steelworkers and U.S. Steel have petitioned for review of the Fifth Circuit's holding that backpay should be awarded to compensate those black workers who suffered lost earnings as a result of the discriminatory practices. Additionally, the Company further petitioned for review of the district court's enlargement of the class represented by John S. Ford et al. to include all the black workers at Fairfield Works who were not otherwise being represented in a private class action.

The district court's enlargement of the *Ford* class was not done contemporaneously with the entry of judgment as U.S. Steel states in its petition. (Pet. at 10). The class was re-defined in the district court's decree entered on May 2, 1973. (Pet.A38) Judgment was not entered by the district court until August 10, 1973. *United States* v. *United States Steel Corporation*, 6 EPD ¶ 8790 (N.D. Ala. 1973). Since neither petitioner included the Judgment of the district court in the appendix to their petitions, the respondents have attached it as an appendix to this brief. (1a-4a)

Reasons for Denying the Writ

The six questions presented by U.S. Steel and the three-part question presented by the Steelworkers challenge two aspects of the Fifth Circuit's decision: the reversal of the district court's denial of backpay to 2,700 black steelworkers who had their employment opportunities restricted by

[1] Citations in this form are to the Appendix to the petition for certiorari filed by United States Steel Corporation in No. 75-1475.

the discriminatory practices of the petitioners and the affirmance of the legality of the district court's re-definition of the *Ford* class.[2]

1. *The Backpay Ruling*

The Union in its three-part question and the Company in its last three questions raise defenses of lack of bad faith, good faith efforts to comply with the law, the unsettled state of the law, the absence of unjust enrichment to the defendants and the breadth of other affirmative relief.[3] No question of law is being raised by these petitions that was not settled by this Court in *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405 (1975). In essence, petitioners here seek a rehearing of the decision in *Albemarle*.

Additionally, petitioners argue that the difficulties of ascertainment of the backpay remedy for individual members of the class was a lawful basis for the district court's

[2] The Fifth Circuit however vacated the lower court's definition of the class and remanded to the lower court to take evidence as to the class "propriety", "scope", "size" and "membership". The Fifth Circuit further stated that "the question on remand will be comprehensive and multifaceted" and suggested that the district court enter findings of fact in support of its determination. (A 83-84).

[3] The Union in attempting to argue that the lower courts found discriminatory steel seniority systems to be lawful under Title VII misstated the history of that litigation. The Union relies on a pre-Title VII decision, *Whitfield* v. *United Steelworkers of America*, but omits its explicit reversal in 1970, *Taylor* v. *Armco Steel Corporation*, 429 F.2d 498 (5th Cir. 1970). Moreover, at the time when the appeal was argued before the Fifth Circuit in *United States* v. *H.K. Porter Company, Inc.* in April, 1970 "the Court, from the bench, indicated that major changes in the seniority and other systems at the plant were required in order to achieve compliance with Title VII of the Civil Rights Act of 1964 . . .", 491 F.2d 1105 (1974). Petitioner, in effect, seeks exemption from liability for backpay under Title VII on the ground that it was in good faith compliance with pre-Title VII law!

use of its discretion in denying backpay relief for the class. This is contrary to the rule of this Court in *Albemarle* that "given a finding of unlawful discrimination, backpay should be denied only for reasons, which, if applied generally, would not frustrate the central statutory purposes of eradicating discrimination throughout the economy and making persons whole for injuries suffered through past discrimination." [4] (422 U.S. at 421)

2. *Standing of the Named Plaintiff*

The Company's challenge to the standing of the named plaintiff on appeal conflicts with settled law that the cause of action in a class action survives the mootness of the claim of the named plaintiff when the issues as to the class is certain to come before the courts, *Sosna* v. *Iowa,* 419 U.S. 393 (1975). The instant case satisfies the three criteria for the survival of the class action after the satisfaction of the named plaintiff's claim which this Court set down in *Sosna* (at 402). It is undisputed that John S. Ford had standing to sue as the named plaintiff in the original suit; that the class was certified by the district court and that the controversy is still alive.

On petitioner's theory it would be possible to scuttle a class action by simply settling the claim of the named plaintiff. Denying the right to appeal to the class because the named plaintiff has been paid would generate precisely

[4] Petitioners seek relief from their obligation to make the injured members of the class whole on the ground that a great many were injured in the context of a complex plant seniority structure thereby creating difficulties of ascertainment of individual remedies. If allowed, this would lead to the anomaly that the only safe discrimination to practice is mass discrimination. As Judge Thornberry put it, ". . . the fact that a defendant has managed to discriminate against many people instead of a few is no ticket to freedom from liability to those who suffered less than the most obvious victims." (A.90)

the evil of the multiplicity of law suits that class actions were designed to prevent.

3. *Modification of the Class*

Petitioner argues that since the class was modified "after trial at judgment" (U.S. Steel Pet. at 2, 10) it was in violation of Rule 23(c)(1) which permits alteration or amendment of the class "before the decision on the merits".

a) Petitioner's question is premature. The proper class has yet to be defined. The Fifth Circuit vacated the lower court's definition of the class and remanded for a hearing on this "comprehensive and multifaceted" question to determine the "propriety", "size", "scope" and "membership" of the class. (A 83-84)

b) Petitioner is in error on the facts, in any case. The decree modifying the class was entered on May 2, 1973. The Judgment of the court was rendered on August 10, 1973. The class was therefore altered "before the decision on the merits" in compliance with Rule 23(c)(1).[5] See *supra* at n. 2.

c) Finally petitioner's reliance on Rule 23(c)(1) is misplaced. In a (b)(2) class action, such as the case at bar, the relevant rule on the timing of the

[5] Even if the class had been amended at the time of judgment, as petitioner incorrectly asserts, there would still have been compliance with Rule 23(c)(1) as Seventh Circuit explained in *Jimenez* v. *Weinberger,* 523 F.2d 689 (1975): ". . . the explicit permission to alter or amend a certification order before decision on the merits plainly implies disapproval of such alteration or amendment thereafter. On the other hand, that degree of flexibility permitted before the merits are decided also indicate that in some cases the final certification need not be made until the moment the merits are decided." (at 697)

determination of the scope of the class is Rule 23(c)(3). That rule states: "the *judgment* in an action maintained as a class action under subdivision (b)(1) or (b)(2), whether or not favorable to the class, *shall* include and describe those whom *the court* finds to be members of the class." (emphasis added) When Judge Pointer in his Decree of May 2, 1973 described those whom he found to be members of the class, he was in strict compliance with the Federal Rules of Civil Procedure.[6]

d) Petitioner's additional complaint of lack of notice and hearing as violative of its right to due process is clearly frivolous. There was no element of surprise or prejudice to the petitioner when the class represented by Ford, et al. was expanded to include individuals who were represented by the United States in a "pattern and practice" suit consolidated for trial with *Ford*, and whose *claims had been thoroughly litigated* at a lengthy trial at which petitioner had full opportunity to present evidence.[7] (A 42-43)

4. *The Class Action Tolling Rule*

Petitioner cites the rule in *American Pipe and Construction Co.* v. *Utah*, 414 U.S. 538 (1974) as authority that the statute of limitations had run for the 2,700 individuals thereby precluding their entry into the class.

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[6] In *Jimenez*, ibid., the Seventh Circuit construed 23(c)(3) as follows: "the language of subparagraph (c)(3) would seem to permit the entry of a single order determining both the merits and the identity of the class. Certainly there is nothing in the rule expressly depriving the district court of power to enter such an order." (523 F.2d at 698)

[7] The petitioner, United States Steel Corporation, put on evidence for approximately thirty-five days of trial.

In *American Pipe*, a class certification was denied and the suit went forward as a private action. The issue before this Court was whether the statute of limitations had run for those individuals, who would have been members of the class had it been certified, with respect to their right to intervene in the private action. The question of the rights of intervenors to get into court where a class action has been denied is irrelevant to the issue of the appropriate inclusion in an aleady certified class of new members whose claims had already been litigated at a consolidated trial.

Petitioner strives for relevance by quoting *American Pipe* as follows: "We are convinced that the rule most consistent with federal class action procedures must be that commencement of a class action suspends the statute of limitation *as to all asserted members of the class . . .*" (Pg. 11 of petition: emphasis by petitioner). Therefore petitioner suggests that since the added members of the new *Ford* class had not been the "asserted" members of the old *Ford* class, then the statute of limitations had run for them. But petitioner's quotation omits the second part of the sentence which reads, "who would have been parties had the suit been permitted to continue as a class action." (414 U.S. 538, 554). Thus, even if the rule in *American Pipe* is relevant, this omitted part of the sentence suggests that the statute of limitations *would* have been tolled for the 2,700 blacks who were not in the class originally because they clearly "would have been members of the class had the suit been permitted to continue as a class action." In the instant case a class action was permitted and the new members were in fact included in the class prior to the entry of judgment. As this Court stated in *American Pipe*, "Thus, the commencement of the [class] action satisfied the purpose of the limitation provision as to all those who might subsequently participate in the suit as

well as for the named plaintiffs." (at 551). Not only were the 2,700 blacks "those who *might* subsequently participate in the suit", they were in fact those who had already participated in the suit. *A fortiori* the statute of limitations tolled for them. The court below properly, indeed necessarily, included them in the class to which the judgment would apply to avoid the possibility of 2,700 private lawsuits.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petitions for certiorari should be denied.

JACK GREENBERG
JAMES M. NABRIT, III
ERIC SCHNAPPER
BARRY L. GOLDSTEIN
STANLEY ENGELSTEIN
10 Columbus Circle
New York, New York 10019

OSCAR ADAMS
JAMES K. BAKER
U. W. CLEMON
Suite 1600, The 2121 Building
2121 Eighth Avenue North
Birmingham, Alabama 35203

Attorneys for John S. Ford, et al.

APPENDIX

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ALABAMA
Southern Division

Civil Action No. 70-906

UNITED STATES OF AMERICA,

Plaintiff;

Civil Action No. 66-343

LUTHER MCKINSTRY, *et al.*,

Plaintiffs;

Civil Action 66-423

WILLIAM HARDY, *et al.*,

Plaintiffs;

Civil Action No. 66-625

JOHN S. FORD, *et al.*,

Plaintiffs;

Civil Action No. 67-121

ELDER BROWN, *et al.*,

Plaintiffs;

Civil Action No. 68-204

ELEX P. LOVE, *et al.*,

Plaintiffs;

Civil Action No. 69-165

JAMES DONALD, *et al.*,

Plaintiffs;

—VS.—

UNITED STATES STEEL CORPORATION, *et al.*,

Defendants.

Appendix

Judgment

It is ORDERED, ADJUDGED and DECREED as follows:

1. *McKinstry* v. *U. S. Steel Corp.*, CA 66-343.—

(a) *Back pay.* The defendants United States Steel Corporation and Local Union 1013, United Steelworkers of America, AFL-CIO-CLC, shall each pay to the eight class members named on the attachment hereto one-half of the amount shown thereon opposite such member's name and badge number. Payments shall be subject to reduction for employment taxes and withholding as may be required by applicable law.

(b) *Attorney's fees.* Said defendants shall each pay to U. W. Clemon, as attorney's fees for the plaintiffs in such case, under 42 U.S.C.A. § 2000e-5(j), the sum of $29,250 (of which $4,250 represents reimbursement of expenses).

2. *Hardy* v. *U. S. Steel Corp.*, CA 66-423.—

(a) *Back pay.* The defendants United States Steel Corporation and Local Union 1489, United Steelworkers of America, AFL-CIO-CLC, shall each pay to the twenty class members named on the attachment hereto one-half of the amount shown thereon opposite such member's name and badge number. Payments shall be subject to reduction for tax withholding and employment taxes as may be required by applicable laws.

(b) *Attorney's fees.* Said defendants shall each pay to Oscar W. Adams, Jr., as attorney's fees for the plaintiffs in such case, under 42 U.S.C.A. § 2000e-5(j),

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the sum of $26,500 (of which $4,000 represents reimbursement of expenses).

3. *Ford* v. *U. S. Steel Corp.*, CA 66-625.—

(a) *Back pay.* The defendants United States Steel Corporation and Local Union 1733, United Steelworkers of America, AFL-CIO-CLC, shall each pay to the thirty-three class members named on the attachment hereto one-half of the amount shown thereon opposite such member's name and badge number. Payments shall be subject to reduction for tax withholding and employment taxes as may be required by applicable laws.

(b) *Attorney's fees.* Said defendants shall each pay to James K. Baker, as attorney's fees for the plaintiffs in such case, under 42 U.S.C.A. § 2000e-5(j), the sum of $29,250 (of which $4,250 represents reimbursement of expenses).

4. *Brown* v. *U. S. Steel Corp.*, CA 67-121.—The defendants United States Steel Corporation and Local Union 1733, United Steelworkers of America, AFL-CIO-CLC, shall each pay to J. Richmond Pearson, as Attorney's fees for the plaintiffs in such case, under 42 U.S.C.A. § 2000e-5(j), the sum of $4,500.00.

5. *Love* v. *U. S. Steel Corp.*, CA 68-204.—The defendants United States Steel Corporation and Local Union 1489, United Steelworkers of America, AFL-CIO-CLC, shall each pay to J. Richmond Pearson, as attorney's fees for the plaintiffs in such case, under 42 U.S.C.A. § 2000e-5(j), the sum of $4,500.00.

6. *Donald* v. *U. S. Steel Corp.*, CA 69-165.—The defendants United States Steel Corporation and Local Union

1013, United Steelworkers of America, AFL-CIO-CLC, shall each pay to Demetrius C. Newton, as attorney's fees for the plaintiffs in such case under 42 U.S.C.A. § 2000e-5(j), the sum of $8,500.00.

7. *Denial of other claims.*—All claims for back pay and attorney's fees are, except as provided in paragraphs 1 through 6 hereof, denied.

8. *Line of Progression Modification.*—Attached hereto is a Line of Progression for Unit 1201, No. 4 Galvanizing Line, Fairfield Steel Plant, which is hereby substituted for the line of progression chart for such unit as contained in the decree dated May 2, 1973. Such change is effective as of August 1, 1973, notwithstanding the 60-day notice provision contained in paragraph 4 of the May 2, 1973, decree.

9. *Order under Rule 54(b).*—In paragraph 15 of the May 2, 1973, order the court severed those claims in civil action 70-906 relating to testing procedures, and such claims have not been determined by this court but remain for further consideration. As to all other claims in the cases appearing the style of this judgment, the court now under Rule 54(b) expressly determines that there is no just reason for delay and expressly directs that judgment, as contained in the decree of May 2, 1973 and this judgment, be entered as a final judgment as against all parties. Final judgments have previously, on May 2, 1973, been entered in CA 69-68 and CA 71-131, which had been consolidated for trial with the cases appearing in the style of this judgment.

Done this the 10th day of August, 1973.

/s/ Sam C. Pointer, Jr.
United States District Judge